STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 28, 2001
v	No. 222701 Saginaw Circuit Court
CEDRIC SANTANA MOTEN, Defendant-Appellant.	LC No. 98-016501-FC

Before: K.F. Kelly, P.J., and White and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct MCL 750.520b(1)(a) and sentenced to life in prison. Defendant appeals his conviction and sentence as of right. We affirm.

I. Basic Facts and Procedural History

The victim was ten years old at the time of the alleged assault. According to the victim, defendant came into her bedroom and told her to go into the closet where he ultimately committed the sexual assault. The victim's mother was not at home when the assault occurred. Defendant's sister, Tara Moten, was in the home and in charge of watching the victim and her younger sibling, Margaret Euell. After the incident, the victim did not immediately advise an adult even though she was bleeding profusely from the vaginal area. Rather, the victim proceeded downstairs into the den and watched some television with Margaret. According to the victim, defendant came into the den and advised her not to tell anyone. Margaret testified that she observed blood spots on the victim's shorts but did not talk with the victim about the blood spots while they were in the den. When the victim and Margaret later moved into the dining room, Margaret told the victim that she witnessed the assault. At this time, defendant's sister Tara, inquired as to the topic of the girls' discussion. In response, Margaret, in the presence of the victim, told Tara about the sexual assault.

When the victim's mother returned home, Margaret stated to her that defendant "did what David did to [the victim][1]." After the victim's mother learned of the assault, she called the

[1] David was previously convicted for sexually assaulting the victim.

police. The police arrived and took the victim to the hospital via ambulance. After medical personnel examined the victim, they determined that her injuries were consistent with a sexual assault and the injuries sustained required surgery to repair. Defendant was arrested, tried and convicted of three counts of criminal sexual conduct. Defendant now appeals his conviction.

II. Admissibility of Hearsay Statements

First, defendant cites as error numerous statements elicited at trial from various witnesses regarding what the children told them. Although defendant segregates the alleged hearsay testimony into "three separate areas," defendant does little to identify the exact statements to which he cites as error and does even less by way of analyzing the issues raised in relation to the facts in the case at bar. Indeed, defendant merely identifies the testimony to which trial counsel objected, and then concludes that the statement that the victim made to Tara Moten, defendant's sister, was not sufficiently reliable. It is well settled that a party may not "`simply . . . assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments . . . .'" *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) (citation omitted.)

It appears that the defendant claims error in the trial court's decision to allow the victim's sister, aunt and mother to testify regarding the sister's statement that defendant "did what David did to [the victim]." Over a hearsay objection, the trial court ruled that the excited utterance exception to the rule against hearsay applied and allowed the statement to come into evidence. The trial court reasoned that the nine year old declarant was still under the stress of the "startling event" when she made the statement to her mother and aunt and as such, the statement retained sufficient indicia of reliability to be admitted and placed before the jury for their consideration. We agree.

Whether to admit evidence lies within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *People v Layher*, 238 Mich App 573, 582; 607 NW2d 91 (1999). A hearsay statement is inadmissible unless the statement falls within the purview of one of the specifically delineated exceptions. See MRE 801(c); MRE 802. An out of court statement proffered for the truth of its assertion is admissible if it "relat[es] to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." MRE 802(3). The justification underlying the excited utterance exception is that, "a person who is still under the `sway of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication so that any utterance will be spontaneous and trustworthy.'" *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998) (citing 5 Weinstein, Evidence (2d ed.), § 803.04[1], p. 803-19.) In *People v Straight*, 430 Mich 418; 424 NW2d 257 (1988), our Supreme Court set forth two requirements necessary to admit an excited utterance: 1) a startling event, and 2) the declarant utter the statement "while under the excitement caused by the event." *Id*. at 424.

In the instant case, the first prong of the *Straight* analysis is easily established. Indeed, a sexual assault is a "startling event." See *Straight*, supra at 425 (stating that "[f]ew could quarrel with the conclusion that a sexual assault is a startling event.") The question thus becomes whether Margaret Euell was still under the stress of the startling event when she stated that "[defendant] did what David did to [the victim]." Defendant contends that the second prong enunciated in *Straight* is not sufficiently satisfied. Defendant points out that by the time that

Margaret made the offending statement, he had been out of the house for approximately two and a half hours thus leaving ample time for contrivance and misrepresentation. We do not agree.

Although the time between the startling event and the statement is instructive, it is not dispositive in determining whether the declarant was still under the stress of the event such that the ensuing statement retained sufficient indicia of reliability to justify applying the exception. *People v Smith*, 456 Mich 543, 551; 581 NW2d 654 (1998). As one court recognized, "[t]he Supreme Court's excited utterance test, `does not contemplate a sequence in which the utterance necessarily follows immediately on the startling event.'" *People v Kowalak*, 215 Mich App 554, 558; 546 NW2d 681 (1996) (citing *People v Straight*, 430 Mich at 424.) Indeed, the focus of the excited utterance exception is not "the lack of time to fabricate" but rather "the lack of capacity" to do so, because of an "overwhelming emotional condition." See *Smith, supra* at 551; see also *Kowalak, supra* at 558.

In the case at bar, we note that a few hours passed between the declarant's perception of the event and her statement to the victim's mother. Notwithstanding, we reject the defendant's assertion that the passage of time removes the statement from the exception. We agree with the trial court's determination that given the nature of the startling event and given the declarant's young age, these factors significantly militate against a finding that the young declarant fabricated or otherwise contrived her story. Additionally, a review of the record reveals that the declarant made the statement to the victim's mother within a very short time after her mother returned to the home from shopping at the mall. The record indicates that the victim's mother came home, went out to the car to retrieve her packages and upon reentry, the declarant told her that "[defendant] did what David did [to the victim.]" Indeed, the declarant seized the very fist opportunity available to tell her mother that her sister was sexually assaulted. A review of the record establishes that the declarant was "scared", thus still under the emotional trauma of the sexual assault that she witnessed upon her sister, such that the reliability and trustworthiness of her subsequent statement was sufficiently protected. We find that the trial court did not abuse its discretion when it admitted this statement in accord with the excited utterance exception to the rule against hearsay[2].

II. Testimony Pertaining to Medical History

Next, defendant argues that the trial court erred by admitting statements made by the victim to three separate health care professionals identifying defendant as the perpetrator. The trial court admitted the testimony on the grounds that the statements were made for purposes of medical diagnosis and treatment thus satisfying the exception contained in MRE 803(4). We agree. MRE 804(4) specifies an exception to the rule against hearsay for

> "[s]tatements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the

[2] We note that defendant cites as error the trial court's decision to admit evidence under the tender years exception embodied in MRE 803A. We acknowledge defendant's argument but do not address it for the reason that the trial court did not rely upon this exception to admit any statements otherwise categorized as hearsay.

cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.

The justification underlying this exception is the "self-motivation to speak the truth to treating physicians in order to receive proper medical care, and the statement must be reasonably necessary to the diagnosis and treatment of the patient." *People v McElhaney*, 215 Mich App 269, 280; 545 NW2d 18 (1996). Indeed, as our Supreme Court noted, "[a] child can have the same selfish treatment-related motive to speak the truth as any adult." *People v Meeboer*, 439 Mich 310, 324; 484 NW2d 621 (1992). However, statements made by children must be "analyzed with more precision" because of the declarants' young ages. *Id*. at 326. Accordingly, the *Meeboer* court set forth ten factors to consider when assessing the trustworthiness of a child's statements: (1) The age and maturity of the declarant; (2) the manner in which the statements are elicited; (3) the manner in which the statements are phrased; (4) use of terminology unexpected of a child of similar age; (5) who initiated the examination; (6) the timing of the examination in relation to the assault; (7) the timing of the examination in relation to the trial; (8) the type of examination; (9) the relation of the declarant to the person identified; and (10) the existence of or lack of motive to fabricate.

In the case *sub judice*, the victim gave three different medical professionals her medical history, each time identifying defendant as the perpetrator. A review of the record in light of the ten factors set forth in *Meeober* reveal that the declarant's statements to each of the medical professionals were inherently trustworthy.

Children over ten years old are presumptively reliable. *People v McElhaney*, 215 Mich App 269, 280; 545 NW2d 18 (1996). At the time that the victim made the statements, she was ten years old. The record did indicate that the victim suffered from a learning disability but is otherwise devoid of any further evidence indicating that the victim did not or could not comprehend the importance of being truthful with medical professionals. Moreover, we find that the victim's statements concerning the sexual assault satisfy all ten factors set forth in *Meeboer* and are thus inherently trustworthy.

The nurse in the emergency room that had initial contact with the victim after the assault testified that in response to an inquiry as to what occurred, the victim stated that defendant put his "private parts" "down there" [pointing to her vagina]" and that he "licked right here "[pointing to her vagina] and that defendant further touched her rectum with his penis. A review of the medical testimony reveals that the victim's rendition of the assault to each of the medical personnel involved was consistent. Additionally, the manner in which the victim relayed the information does not indicate that an adult influenced the child's statements. References to defendant putting his "private parts" "down there" are not scientifically sophisticated explanations thus bolstering the inherent trustworthiness of the child's statements.

The timing of the examination relative to the assault indicates that the reason for the examination was for purposes of medical treatment. Indeed, almost immediately after learning of the sexual assault upon her daughter, the victim's mother contacted the police. After the police gathered the evidence, the victim was thereafter transported to the hospital via ambulance. The record revealed that after the assault, the victim bled profusely from the vaginal area thus indicating the need for immediate medical treatment. Consequently, the timing of the examination also strengthens the trustworthiness of the child's statements.

A review of the record further establishes that the type of examinations performed all related to identifying the source of the trauma as well as the origin of the injury. Every time that the child relayed the information pertaining to the sexual assault, the victim positively identified defendant as her assailant. During the trial, medical testimony revealed that the identity of the perpetrator is important for determining the child's risk for acquiring sexually transmitted diseases, AIDS and the like. Moreover, as the *McElhaney* court recognized, "[s]exual abuse cases involve medical, physical, developmental, and psychological components, all of which require diagnosis and treatment." *McElhaney, supra* at 282. We also note that according to the record, the victim bled profusely from the vaginal area after the assault. For a ten year old child, it would be difficult to imagine circumstances under which the "self-motivation to speak the truth" would be more compelling. *Id*. at 280. Finally, the defendant did not put forth any evidence to suggest that the child victim had a motive to fabricate.

Decisions whether to admit or exclude evidence lay within the trial court's sound discretion and will not be disturbed by this Court absent an abuse of discretion. *People v Jenkins*, 244 Mich App 1, 21; 624 NW2d 457 (2000). A review of the record establishes that the child's statements to each of the medical professionals advising of the assault and further identifying defendant as the assailant were for purposes of medical treatment and diagnosis and reasonably necessary to develop a comprehensive treatment plan for the victim. Accordingly, we find that the trial court did not abuse its discretion in this regard.

Defendant also challenges the trial court's ruling allowing testimony from Officer Taylor as to statements that the victim made upon her arrival at the scene on the grounds that such testimony constitutes inadmissible hearsay. Again, we do not agree. The trial court permitted the officer to testify that defendant "raped her" because that information was necessary to "explain why [the officer] proceeded to do what she did in terms of the course of carrying out her job, her employment." The trial court further cautioned the jury "not to use this for the truth of the statement, but rather as to the reason why the witness took the action that she did." By its very definition, a hearsay statement is offered for the truth of its assertion. Here, the trial court allowed the testimony but cautioned the jury that the statement was not to be considered for its truth. In other words, the statement was proffered for a non hearsay purpose; specifically, to provide an explanation as to the officer's subsequent conduct in gathering evidence and further questioning of the victim all of which were activities necessary to discharge her professional duties. To the extent that the officer's motivation was irrelevant, we find that the evidence was cumulative and did not affect the outcome of the trial.

III. Defendant's Sentence

Finally, defendant argues that his sentence condemning him to life imprisonment was disproportionate. We disagree. Although the trial court imposed a sentence at the very top end of the guidelines, defendant's sentence was nevertheless within the recommended range. At sentencing, the trial court referenced defendant's prior record and specifically noted additional crimes of violence perpetrated against women. Defendant has failed to identify any unusual circumstances to overcome the presumptive proportionality of his sentence. *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990); *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). Accordingly, we conclude that the trial court did not abuse its sentencing discretion.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Helene N. White
/s/ Michael J. Talbot